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No. 07-(1)

IN THE

Supreme Court of the United States

AMERICAN TELECOM CO., L.L.C.;
AMERICAN TELECOM GROUP-USA, L.L.C.,

Petitioners,

v.

REPUBLIC OF LEBANON, a foreign State,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to the "commercial activity exception" of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1605(a)(2), subject matter jurisdiction exists in a suit against a foreign state if: (1) the foreign state's conduct is commercial in nature; and (2) the foreign state's conduct causes a direct effect in the United States. The Sixth Circuit affirmed the District Court's dismissal of Petitioners, American Telecom Company, LLC, ("ATC") and American Telecom Group-USA, LLC's, ("ATG's") complaint for lack of subject matter jurisdiction on the grounds that the effects in the United States were not "direct effects". The following questions are presented:

I. Was there a "direct effect" in the United States pursuant to the FSIA where the Republic of Lebanon, a foreign state, fraudulently induced ATC and ATG, two American corporations, to participate in a bid on a contract, then tortiously and intentionally disqualified them from the bidding solely because ATC and ATG are American corporations and where such intentional, tortious and fraudulent conduct caused effects in the United States?

II. What standard should be used to determine whether an effect is a "direct effect" under the "commercial activity exception", the "legally significant acts" test, as has been adopted by the Second, Eighth, Ninth and Tenth Circuits and has been explicitly rejected by the Fifth and Sixth circuits, or the test used by Fifth and Sixth circuits?

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OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Michigan from which Petitioners seek review was issued on September 9, 2005 (attached hereto as Appendix A) and was affirmed by the United States Court of Appeals for the Sixth Circuit in an Opinion dated August 29, 2007 (attached hereto as Appendix B) and ensuing Judgment of the same date.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE IN THIS CASE

28 U.S.C. § 1330:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

28 U.S.C. § 1604:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2):

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

From 1994 through 2002, two companies held contracts with Respondent, Lebanon, to manage the two Global System for Mobile ("GSM") networks in Lebanon (the "GSM Networks") for a fee of $7,500,000 per month. R.28-29, Plaintiffs' Brief in Opposition to Motion to Dismiss, Exh. O at ¶¶ 5 and Exh. P, Joint Appendix filed by the parties in the Sixth Circuit ("JA")[1] at 1066, 1081. In 2002, Lebanon terminated the contracts, and announced that it would soon be holding an auction-tender for the management of the GSM Networks. *Id.*

In January 2003, after forming a team of affiliates[2], Petitioners, ATC and ATG, paid a fee of $25,000 for a good faith and fair opportunity to participate in the auction-tender. *Id.*, Exh. O at ¶¶ 7-14 and Exh. P, JA at 1055-1056, 1081. Despite the fact that Petitioners' team satisfied every requirement to be pre-qualified for the auction-tender, Petitioners' team, the only American

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1. The exhibits relied upon by Petitioners which are not attached in the Appendix hereto are referenced by page number to the Joint Appendix that was submitted to the Sixth Circuit in connection with the underlying proceedings.

2. The team contained specialists in operational management and consultation services to the telecom industry in the United States and around the world, and experts in the implementation and management of wireless communications networks. R.28-29, Plaintiffs' Brief in Opposition to Motion to Dismiss, Exhs. O at ¶ 11 and P, JA at 1055-1056, 1081. In addition, the team brought together 60 professionals experienced in operating wireless and wireline companies in the United States, Europe and Asia, most of whom were professionals with Ameritech International's European investments and had over 20 years of experience. *Id.*

group that applied to participate in the auction-tender, was disqualified with absolutely no explanation. *Id.*, Exh. O at ¶¶ 7-16 and Exh. P, JA at 1055-1057, 1081.

Inasmuch as the auction-tender was eventually cancelled due to questionable conduct by the Lebanese official running it, Lebanon announced a new tender (the "New Public Tender") to be run by a different department of the government of Lebanon, the Ministry of Telecommunications. *Id.*, Exh. O at ¶¶ 22-24 and Exh. P, JA at 1058, 1081.

Petitioners were concerned about submitting a proposal for the New Public Tender inasmuch as many less qualified non-American companies had been pre-qualified in the auction-tender while Petitioners' group had been disqualified. *Id.*, Exh. O at ¶ 25 and Exh. P, JA at 1058-1059, 1081. However, Petitioners opted to submit a proposal only after the Minister of Telecommunications and other Lebanese officials convinced Petitioners that Lebanon wanted Americans to participate and that the New Public Tender would be handled in an appropriate manner, ensuring that every company, including any American company, would be treated in a fair manner and in good faith. *Id.*, Exh. O at ¶¶ 25-30 and Exh. P, JA at 1058-1060, 1081. With the assurances of the Lebanese Government, Petitioners paid Lebanon a fee of $5,000 for a good faith and fair opportunity to participate in the New Public Tender. *Id.*

However, unbeknownst to Petitioners, Lebanon only wanted an American company to participate in the New Public Tender in order to lend legitimacy to the process and to drive down the bids of the European and Arab

companies. In fact, Lebanon had no intention of ever allowing an American company to be awarded a GSM Network management contract. *Id.*, Exh. O at ¶ 29 and Exh. P, JA at 1059, 1081.

After months of preparation costing hundreds of thousands of dollars, Petitioners submitted their bid for the four-year management contract of the GSM Networks pursuant to all of the rules and requirements contained in the Tender Information and Procedures (the "TIP") (*Id.*, Exh. Q, JA at 1089-1229), which outlined the guidelines, requirements and timetable for the New Public Tender. *Id.*, Exh. O at ¶¶ 31-34 and Exh. P, JA at 1060-1061, 1081. In particular, Petitioners submitted emailed copies of several submission documents inasmuch as the TIP did not bar Petitioners from submitting emailed copies, and inasmuch as a Lebanese government employee had confirmed that emailed copies would be acceptable for the submission. *Id.*, Exh. O at ¶¶ 40-42, Exh. P and Exh. Q, JA at 1063, 1081, 1089-1229.

Inasmuch as the bidding process as designated in the TIP called for an "open tender" period where the parties could adjust their bids after the initial bids were revealed, Petitioners strategically made an initial bid at $6.16 million per month for the management of the GSM Network and were prepared to lower its bid to $3.99 million per month during the "open tender" portion of the bidding. *Id.*, Exh. Q, Exh. O at ¶ 43 and Exh. P, JA at 1103, 1063-1064, 1081.

On March 29, 2004, the date of the New Public Tender, Lebanon shockingly informed Petitioners that they were disqualified from participating because one

of the documents in Petitioners' submission was an email document instead of an original document. *Id.*, Exh. O at ¶ 44 and Exh. P, JA at 1064, 1081. Defendant then announced the pre-qualification of seven non-American companies: Detecon of Germany, Orange of France, Orascom of Egypt, Mobile Telecom Company of Kuwait, Telenor of Norway, Telcom Italia Mobile of Italy and Digicel of Ireland. *Id.*, Exh. O at ¶ 45 and Exh. P, JA at 1064, 1081.

At the conclusion of the bidding, Detecon and Mobile Telecom Company were the low bidders and were awarded the management contracts for the GSM Networks. *Id.*, Exh. O at ¶ 46 and Exh. P, JA at 1064-1065, 1081. Detecon was awarded the four-year management contract for one network for $4.2 million per month, or $201 million total, and Mobile Telecom Company was awarded the four-year management contract for the other network for $4.25 million per month, or $204 million total. *Id.* If Petitioners had not been improperly disqualified, Petitioners would have been the low bidder at $3.99 million per month ($191.5 million total) and would thus have been awarded the management contracts for at least one of the GSM Networks. *Id.*, Exh. O at ¶ 50 and Exh. P, JA at 1065, 1081.

On July 14, 2004, Petitioners, ATC and ATG, filed their Complaint alleging breach of contract, fraud, promissory estoppel and breach of quasi contracts. R.1, Complaint, JA at 10-37. The Complaint set out the relevant facts regarding Lebanon's wrongful and tortious acts committed against ATC and ATG in connection with the two separate tenders for the

extremely lucrative commercial contract for the management of one of the two GSM Networks in Lebanon. *Id.*

On August 24, 2005, Petitioners served the Summons and Complaint upon Lebanon at its Office of the Counsel General in Detroit, Michigan, as had been agreed upon by the parties. R.19, Plaintiffs Brief in Opposition to Motion to Set Aside Default Judgment, Exhs. 2, 3, 7, 8 and 9, JA at 388-389, 393-506. However, Lebanon failed to answer the Complaint, and Petitioners sought and obtained a clerk's entry of default, moved for entry of default judgment, appeared for a motion hearing, and obtained a default judgment in the amount of $420 million. R.4, Default, JA at 107; R.5, Motion for Default Judgment, JA at 108-155; R.11, TR of March 9, 2005 Hearing, JA at 1299-1309 ; R.8, Default Judgment, JA at 157.

After the default judgment was entered, Lebanon finally appeared for the very first time in the District Court and moved to get an extension of time to file a motion to set aside default judgment. R.13, Defendant's Ex-Parte Motion to Extend, JA at 160-163. On April 15, 2005, Lebanon filed a Motion to Set Aside Default Judgment and a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(2)[3]. Lebanon R.15, Defendant's

3. The District Court divided up the hearings for the two portions of Lebanon's motions, and scheduled for hearing Defendant's Motion to Set Aside Default Judgment only on May 9, 2005 and set Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(2) for hearing on June 15, 2005. R.16, Notice of Hearing on Motion to Set Aside Default Judgment and (Cont'd)

Motion to Set Aside Default Judgment and Motion to Dismiss, JA at 166-356.

On May 9, 2005, the District Court issued an opinion granting Respondent's motion to set aside the default judgment. R.23, Order Granting Motion to Set Aside Default Judgment, JA at 38-51. On September 7, 2005, the District Court held the hearing on Lebanon's motion to dismiss. R.39, TR of September 7, 2005 Hearing, JA at 1329-1340. On September 9, 2005, the District Court issued an opinion and order granting Respondent's motion to dismiss for lack of subject matter jurisdiction, and a final judgment in favor of Respondent. R.33, Order Granting Defendant's Motion to Dismiss, JA at 52-63; R.34, September 9, 2005 Judgment, JA at 64.

Petitioners filed their Notice of Appeal on October 6, 2005. R.35, Notice of Appeal, JA at 65. On August 29, 2007, the Sixth Circuit issued an Opinion (Appendix B) and Judgment affirming the District Court's decision on the faulty grounds that the effects that resulted from Lebanon's improper disqualification of ATC and ATG were not "direct effects" under the commercial activity exception of the FSIA.

(Cont'd)

Motion to Dismiss, JA at 357; R.17, Notice of Hearing on Motion to Set Aside Default Judgment, JA at 358. The hearing for Lebanon's Motion to Dismiss was subsequently moved to September 7, 2005 after Lebanon withdrew the prior motion and filed a new motion to dismiss. R.25, Notice of Withdrawal of April 15, 2005 Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(2), JA at 623; R.26, Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1), JA at 626; R.27, Notice of Motion Hearing, JA at 895.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Determine Whether A Foreign State Is Entitled To Immunity Under The FSIA Where It Fraudulently Induced An American Corporation To Bid On A Contract And Then Intentionally And Tortiously Disqualified The American Corporation From The Bidding Solely Because It Was An American Corporation And Where Such Intentional And Tortious Conduct Caused Effects In The United States.

Whether a foreign state should be granted immunity under the FSIA when it committed intentional and tortious acts that injured an American corporation or citizen is a profoundly important question that should be addressed by this Court. If the Sixth Circuit's decision is allowed to stand, it would signal to every foreign state that it can defraud any American without having to face the consequences of such fraudulent conduct in the United States. Indeed, in this increasingly global economy, the Sixth Circuit decision effectively bars any American from even attempting to enter into contracts or to do business with any foreign states or even any agents or instrumentalities of a foreign state inasmuch as the American company has no protection whatsoever by the United States courts for any fraud committed by the foreign state. In fact, even if the foreign state fraudulently induces an American citizen or company to do business with it, and then breaches a contract or otherwise acts improperly, the foreign state would still be granted immunity under the improper application of the commercial activity exception by the Sixth Circuit.

A. The Commercial Activity Exception of the FSIA Applies to this Action.

28 U.S.C. § 1330 grants subject matter jurisdiction to a United States District Court over any non jury civil action against a foreign state for which the foreign state is not entitled to immunity under the Foreign Sovereign Immunity Act ("FSIA"). *See*, 28 U.S.C. § 1330. The FSIA specifically provides that a foreign state does not have immunity if one of several exceptions apply. 28 U.S.C. § 1605 provides, in pertinent part:

> (a) *A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–*
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*

Indeed, this Court has held that the *jurisdictional immunity granted to foreign states by the FSIA is restricted to suits involving public acts and does not extend to commercial or private acts. See, Gould, Inc.*

v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988). "The FSIA is designed to facilitate suits in courts in the United States arising from commercial or private acts of foreign states." *Id.*

The most significant of the exceptions to sovereign immunity is the commercial activity exception of § 1605(a)(2). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Specifically, the commercial activity exception provides an exception to sovereign immunity where:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*

28 U.S.C. § 1605(a)(2) (emphasis added).

There is no dispute that Lebanon is a foreign state and that Lebanon's actions were commercial in nature under the FSIA. Appendix B at 4. Therefore, the only dispute here is whether the act caused a direct effect in the United States.

The proper standard to be used in determining the existence of a "direct effect in the United States" is dictated by the this Court's decision in *Weltover*, 504 U.S. 607. In *Weltover*, this Court was faced with the question

of whether subject matter jurisdiction was present in a lawsuit filed in a United States district court by two *foreign corporations and a foreign bank* against a foreign nation. The foreign corporate plaintiffs sued Argentina when Argentina attempted to reschedule the payment of bonds that had been issued by Argentina with a specific date for payment. *Id.* The *only connection* to the United States was that the foreign corporate plaintiffs had designated a New York bank for the delivery of the money owed to them on the bonds. *Id.* Despite the fact that *none of the parties were American*, and there was *very minimal connections to the United States*, this Court agreed with the Second Circuit Court of Appeals' ruling that there was a *direct effect to the United States.* However, this Court declined to follow the Appeals Court's reasoning that the effect was direct enough on the United States because the court should try to "preserve New York City's status as a preeminent commercial center." *Id. Instead, this Court held that a direct effect was present when the effect on the United States follows "as an immediate consequence of the defendant's . . . activity."* *Id.* at 618. This Court then stated that "[b]ecause New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619.

B. Lebanon's Conduct Caused a Direct Effect in the United States

The Sixth Circuit somehow contends that the effect upon the United States which resulted from Lebanon's fraudulent inducement of Petitioners to participate in the Auction-Tender and New Public Tender and subsequent fraudulent disqualification of Petitioners from the New Public Tender was not the "immediate consequence" of Lebanon's activity. However, the Sixth Circuit's holding in this regard is flat wrong and gives the green light to any foreign state to fraudulently induce any American into conducting business with it without any possible recourse in the United States against the foreign state for any fraudulent conduct.

In the case at bar, when the "immediate consequence" test is applied, it is clear that *Lebanon does not have immunity.* Indeed, it is patently obvious that Petitioners suffered significant and immediate damages as a result of Lebanon's tortious conduct in fraudulently inducing Petitioners to participate in the Auction-Tender and the New Public Tender even though Lebanon never had any intention whatsoever of allowing Petitioners to actually participate in either tender. In fact, as a direct and immediate result of these fraudulent misrepresentations, Petitioners, two American corporations, paid a total of $30,000 in fees from a United States bank to participate in the two tenders, plus paid over $500,000 in expenditures that came directly from the United States in the supposed "pursuit" of a contract for which Lebanon never intended to even consider Petitioners. R.1, Complaint, ¶¶ 9, 13-14, 24, 29-30, Apx. 12-17.

Shockingly, the Sixth Circuit held that such conduct was not "immediate" because Petitioners were not *required* to submit payment from an American bank, but merely chose to do so. Appendix B at 6. However, this reasoning completely undermines the commercial activity exception in situations such as here where a foreign state fraudulently induces an American company to pay monies to it. Indeed, the Sixth Circuit decision allows a foreign state to fraudulently induce an American company to pay monies to it so long as it does not require that the money come from a United States bank. However, both the harm to the American company and the effect upon the United States remains exactly the same.

Moreover, the Sixth Circuit reasoning is entirely flawed with respect to Petitioners' theory. Indeed, the Sixth Circuit reasoned as follows:

> Under [Petitioners'] theory, the direct effect requirement is effectively excised from the statute because, under this theory, any bidding process conducted – or not conducted – anywhere in the world would have a direct effect in the United States. For example, if a U.S. bidder wins a bid, money flows to the U.S., and if the U.S. bidder loses, then no money flows to the U.S.; win or lose, according to the theory, bidding causes a direct effect. If a U.S. bidder is disqualified and does not bid at all, then no money flows to the U.S. – a direct effect. If a U.S. company is not invited to bid, then no money flows to the U.S. – another direct effect. A foreign country's

> failure even to conduct a bidding process would have a direct effect in the United States because no money would flow to a U.S. company that would presumably have won the bid and brought money back to the U.S. It is hard to imagine a circumstance under [Petitioners'] theory that would not cause a direct effect in the United States.

Appendix B at 6. However, this characterization of Petitioners' theory is absolutely untrue and it completely ignores the fact that here, Lebanon fraudulently induced Petitioners into participating in the Auction-Tender and the New Public Tender in the first place. Indeed, Petitioners do not argue that an American Company should be able to sue a foreign state in the United States just because it somehow was tangentially damaged by a foreign state's failure to not conduct a bidding process, or to not invite it to participate. However, when a foreign state *fraudulently induces* an American company to participate in a bidding process in which it otherwise would not have participated but for the representations by the foreign state, causes them to pay over $500,000 in pursuit of the contract, and then improperly disqualifies the American company even though it would have won the bidding process, it certainly holds true that such injuries to the American company were, and should be, a direct effect of the foreign state's conduct.

In addition, besides the money that American Petitioners were induced to pay from the United States to Lebanon as a result of the fraudulent inducement and fraudulent misrepresentations, there were significant other direct effects in the United States as a result of Lebanon's improper disqualification of Petitioners.

First and foremost, there is no doubt that the direct result of the improper disqualification of Petitioners was to deprive two American corporations from receiving the lucrative contracts at issue which derive hundreds of millions of dollars in revenue for the contract holder. Not only did Lebanon's conduct thus prevent money from being paid *into* the United States, but it also prevented money from being paid *to* the United States. Indeed, Petitioners, as American corporations, are required to pay taxes to the United States on all earnings realized, including the earning from the management of the GSM Networks. Such earnings would have been in the hundreds of millions of dollars, and the tax liability would have been substantial, if Lebanon had not fraudulently disqualified Petitioners from the New Public Tender. Furthermore, the United States lost tax revenue of all of the American employees of Petitioners that it would have earned but for Lebanon's tortious and improper conduct in improperly disqualifying Petitioners.

II. Review Is Further Warranted To Resolve A Circuit Split Regarding The Proper Test To Use In Determining Whether There Is A Direct Effect In The United States Under The Commercial Activity Exception.

This Court held in *Weltover*, *supra*, that "an effect is direct if it follows as an immediate consequence of the defendant's activity." However, as the Sixth Circuit noted in its Opinion, lower courts have found the "immediate consequences" test difficult to apply. Appendix B at 5. This difficulty has resulted in a distinct circuit split with respect to applying the Weltover "immediate

consequence" test. Indeed, the Second[4] and Ninth[5] Circuits have both adopted the "legally significant acts" test, which provides that a direct effect can only be found if a legally significant act (such as the payment of monies on a contract) occurs in the United States. The Eighth[6] and Tenth[7] Circuits find the "legally significant acts" test helpful but do not explicitly require that it be met in order to find a direct effect. On the other hand, the Fifth[8] and Sixth[9] Circuits have explicitly renounced the "legally significant acts" test altogether.

Here, the Sixth Circuit incorrectly held that it did not have to reach the issue of whether the "legally significant acts" test or any of the other well reasoned grounds contained in the opinions from other Circuits, was the proper test. However, although Petitioners concedes that there were no legally significant acts which occurred in the United States, the Sixth Circuit was absolutely wrong in determining that there was not a direct effect in the United States as explained in Part I above. Accordingly, a decision overturning the Sixth Circuit's opinion below would provide this Court with an opportunity to clarify the decision in *Weltover* and

4. *Filetech SA v Fr. Telecom SA*, 157 F.3d 922 (2d Cir. 1998).

5. *Adler v. Fed. Republic of Nig.*, 107 F.3d 720 (9th Cir. 1997).

6. *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993).

7. *United World Trade v. Mangyshlakneft Oil Prod. Ass'n.*, 33 F.3d 1232 (10th Cir. 1994).

8. *Voest-Alpine Trading USA Corp. v Bank of China*, 142 F.3d 887 (5th Cir. 1998).

9. *Keller v Cent. Bank of Nig.*, 277 F.3d 811 (6th Cir. 2002).

provide a uniform test for determining whether a direct effect is present among all of the Circuits of the United States Court of Appeals.

CONCLUSION

For all the foregoing reasons, Petitioners, American Telecom Company, LLC and American Telecom Group-USA, LLC, respectfully request that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

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November 27, 2007

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 29, 2007

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-2408

AMERICAN TELECOM CO., L.L.C.;
AMERICAN TELECOM GROUP-USA, L.L.C.,

Plaintiffs-Appellants,

v.

REPUBLIC OF LEBANON, a foreign State,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 04-72596—Nancy G. Edmunds, District Judge.

Argued: November 2, 2006

Decided and Filed: August 29, 2007

Before: RYAN, BATCHELDER,
and SUTTON, Circuit Judges.

Appendix A

OPINION

ALICE M. BATCHELDER, Circuit Judge. American Telecom Company, LLC and American Telecom Group-USA, LLC (collectively "American Telecom") appeal from the order of the district court dismissing, under Fed. R. Civ. Pro. 12(b)(1) for want of federal subject-matter jurisdiction, their complaint against the Republic of Lebanon ("Lebanon"). The question presented is whether the district court erred by finding that Lebanon's conduct did not cause a direct effect in the United States and therefore that the 28 U.S.C. § 1605(a)(2) commercial activity exception to FSIA immunity did not apply. Finding no error, we affirm.

I.

American Telecom was a bidder for a contract to manage cellular telephone networks in Lebanon. Upon Lebanon's invitation to bid, American Telecom paid $25,000 to participate in an Auction Tender, but was disqualified without explanation during the pre-qualification stage. Due to questionable conduct by the officials conducting the Auction Tender, however, Lebanon cancelled it in favor of a New Public Tender. According to American Telecom, Lebanese officials persuaded American Telecom to pay another $5,000 and participate in the New Public Tender, with assurances of fairness and good faith. As a further condition to its being permitted to participate, American Telecom also had to submit two documents (an Expression of Interest

and a Non-Disclosure Undertaking), both of which required American Telecom's acknowledgment that the bidding was not binding upon Lebanon in any way.

American Telecom claims that it spent over $500,000 preparing its bid in compliance with the Tender Information and Procedures (TIP) document, which required a $2 million tender bond. The TIP specified: "The Republic of Lebanon reserves the right to reject the offer to manage either of the Mobile Businesses through the Tender, and to discontinue the Tender at any time for any reason." Because the TIP structured the bidding to allow the qualified bidders to adjust their bids after the initial bids had been revealed, American Telecom intentionally bid $6.16 million per month, but was prepared to lower its bid to $3.99 million per month at adjustment time. In its rush to comply with the submission deadline, American Telecom submitted several documents, including the tender bond, via email (allegedly in reliance on a verbal approval by a Lebanese employee).

Lebanon disqualified American Telecom because the tender bond was an email and not an original document; it pre-qualified seven other companies, none of which was an American company. Ultimately, Detecom (a German company) won the management contract for one network ($4.2 million/month; $201 million total) and Mobile Telecom Co. (a Kuwaiti company) won the other ($4.25 million/month; $204 million total). The management contracts required each winning bidder to form a company in Lebanon, hire all the Lebanese-

interim-management firm's employees who chose to remain, and deposit all revenues into a Lebanese bank account.

After its disqualification, American Telecom sued Lebanon in federal court, alleging breach of contract, fraud, promissory estoppel, and breach of quasi contract. Subject matter jurisdiction was predicated on 28 U.S.C. § 1330. American Telecom served Lebanon at its Office of the Counsel General in Detroit, Michigan, as had been agreed upon by the parties. When Lebanon failed to answer, American Telecom sought and obtained a clerk's entry of default, moved for default judgment, appeared for a motion hearing, and obtained a default judgment in the amount of $420 million. Counsel for Lebanon eventually responded, filed a special appearance in the district court, and moved to set aside the default judgment and the default. The court granted the motion and Lebanon then moved to dismiss the action for lack of subject matter jurisdiction. The district court granted this motion as well, and American Telecom now appeals both orders.

II.

Subject matter jurisdiction is always a threshold determination. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (there is no "doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt"). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction

may involve a facial attack or a factual attack. *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir.2005). "When a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the district court must weigh the evidence and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter." *Id.* We review factual findings for clear error and applications of law *de novo. Id.*

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-11, "grants federal district courts jurisdiction over civil actions against foreign states 'as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity' under either another provision of the FSIA or 'any applicable international agreement.' " *Republic of Austria v. Altmann*, 541 U.S. 677, 681, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (quoting 28 U.S.C. § 1330(a)). The statutes say:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam *with respect to which the foreign state is not entitled to immunity* either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a) (emphasis added).

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act *a foreign state shall be immune* from the jurisdiction of the courts of the United States and of the States *except as provided* in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (emphasis added).

The specific exception at issue here will be discussed in Section III, *infra*. The point at this stage is the peculiar manner in which jurisdiction is acquired: first, the court presumes immunity (§ 1604) but looks for an exception (§§ 1605-07); then, only if the court finds that the "foreign state is not entitled to immunity" will the court have subject matter jurisdiction (§ 1330(a)). As the Supreme Court has explained:

> The statute must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies-and in doing so it must apply the detailed federal law standards set forth in the Act.

Appendix A

Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 493-94, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). A footnote reads:

> The House Report on the Act states that 'sovereign immunity is an affirmative defense that must be specially pleaded,' H.R.Rep. No. 94-1487, at 17 [U.S.Code Cong. & Admin.News 1976, 6604, 6615]. Under the Act, however, subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, *even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable* under the Act.

Id. at 494 n. 20, 103 S.Ct. 1962 (emphasis added). Elsewhere, the Court has stated similarly:

> We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity.

Appendix A

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989).

The ordinary principles of subject matter jurisdiction still apply when jurisdiction is premised on an exception to the FSIA—i.e., an order entered by a court that lacks subject matter jurisdiction is a nullity and the court's only recourse is to dismiss the case:

> Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction.

Ins. Corp. of Ir., Ltd. v. Co. des Bauxites de Guinee, 456 U.S. 694, 701-02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

> Courts are constituted by authority and they cannot [go] beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are *not voidable, but simply void, and this even prior to reversal.*

Vallely v. N. Fire & Marine Ins. Co., 254 U.S. 348, 353-54, 41 S.Ct. 116, 65 L.Ed. 297 (1920) (emphasis added).

> The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), *may be raised* by a party, or by a court on its own initiative, at any stage in the litigation, *even after* trial and *the entry of judgment.* Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.'

Arbaugh v. Y & H Corp., 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (emphasis added).[1]

III.

American Telecom contends that the "commercial activity exception" to FSIA immunity divests Lebanon of foreign sovereign immunity. That exception states, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or

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1. We note, however, that these cases do not permit a *collateral* attack on subject-matter jurisdiction: "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations-both subject matter and personal." *Ins. Corp. of Ir.*, 456 U.S. at 702 n. 9, 102 S.Ct. 2099 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), and *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938)).

> of the States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*

28 U.S.C. § 1605(a)(2) (emphasis added). There is no dispute that Lebanon is a foreign state, *see* § 1603(a), or that the bidding for the cellular telephone management contracts was a "commercial activity," *see* § 1603(d), that occurred outside the United States. The question is whether it caused a "direct effect" in the United States, *see* § 1605(a)(2).

"[A]n effect is direct if it follows as an immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). "Of course the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States. But we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.' " *Id.*

Lower courts, however, have found this "immediate consequences" test difficult to apply. *See* David E. Gohlke, Comment, *Clearing the Air or Muddying the Waters? Defining " A Direct Effect in the United States" Under the Foreign Sovereign Immunities Act After* Republic of Argentina v. Weltover, 18 Hous. J. Int'l L.

261, 285 (1995). As a result, the Second[2] and Ninth[3] Circuits require a "legally significant act" in order to find a direct effect, the Eighth[4] and Tenth[5] Circuits find the legally-significant-act test helpful but not required, and the Fifth[6] and Sixth[7] Circuits have renounced any legally-significant-act test. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat it Like One*, 5 Chi. J. Int'l L. 675, 687-90 (2005).

But, while the circuits have framed the inquiry differently, those differences have no impact here. The present case is easily resolved without resort to any legally significant act (or any of the other well-reasoned grounds contained in the opinions of our sister circuits). American Telecom argues[8] that *Keller v. Central Bank*

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2. *Filetech SA v Fr. Telecom SA*, 157 F.3d 922 (2d Cir.1998).

3. *Adler v. Fed. Republic of Nig.*, 107 F.3d 720 (9th Cir.1997).

4. *Gen. Elec. Capital Corp. v Grossman*, 991 F.2d 1376 (8th Cir.1993).

5. *United World Trade v Mangyshlakneft Oil Prod. Assn.*, 33 F.3d 1232 (10th Cir.1994).

6. *Voest-Alpine Trading USA Corp. v Bank of China*, 142 F.3d 887 (5th Cir.1998).

7. *Keller v Cent. Bank of Nig.*, 277 F.3d 811 (6th Cir.2002).

8. American Telecom also argues that we should rely on *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir.1988), a pre- *Weltover* case that arguably set forth a direct (Cont'd)

of Nigeria, 277 F.3d 811 (6th Cir.2002), is controlling. To the extent that *Keller* rejects a legally-significant-act test, that is true. *See id.* at 818. Beyond that, however, *Keller* merely stands for the proposition that a "defendant's failure to pay promised funds to a [United States] account constitute[s] a direct effect in the United States." *Id.*; *accord Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 889-90 (5th Cir.1998). But Lebanon never promised to pay American Telecom anything, and even the eventual contract payments to the winning bidder were to be deposited in a Lebanese bank. The *Keller* holding does not help American Telecom.

In truth, this case is far easier than any of the cases cited above, and is perhaps the rare case in which the Supreme Court's holding in *Weltover* requires no elaboration: "an effect is direct if it follows as an *immediate consequence* of the defendant's activity." *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160 (emphasis added). Even by American Telecom's own description—the first sentence of which we frankly find very difficult

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(Cont'd)

effect test as: "if the corporation is the primary direct, rather than indirect, victim of the conduct, *and* if injurious and *significant* financial consequences to that corporation were the *foreseeable*, rather than fortuitous, result of the conduct," *id.* at 453 (emphasis added). This statement is at direct odds with the Supreme Court's statement in *Weltover* that "we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.' " *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160. Accordingly, we must conclude that American Telecom's reliance on *Gould* is misplaced.

to follow—the effect is not an immediate consequence of the activity ascribed to Lebanon:

> First and foremost, if Plaintiffs were not improperly disqualified, there is no doubt that the direct and foreseeable result of the improper disqualification of Plaintiffs was to deprive Plaintiffs from receiving the lucrative contracts at issue which derive hundreds of millions of dollars in revenue for the contract holder. Not only would this prevent money from being paid *into* the United States, but it would also prevent money from being paid *to* the United States. Indeed, Plaintiffs, as American corporations, would have been required to pay taxes to the United States on all earnings realized as a result of the GSM Network management contracts.... Furthermore, ... all of Plaintiffs' American employees would have been required to pay Federal income taxes on the income earned by virtue of their employment.

Apt.'s Br. at 55 (emphasis in original). As is evident from this attenuated approach, the only immediate consequence of Lebanon's activity was American Telecom's disqualification from the short list of qualified bidders; everything else is entirely derivative of that action, and therefore not an "immediate consequence" and not a direct effect.

Under American Telecom's theory, the direct effect requirement is effectively excised from the statute because, under this theory, any bidding process conducted-or not conducted-anywhere in the world would have a direct effect in the United States. For example, if a U.S. bidder wins a bid, money flows to the U.S., and if the U.S. bidder loses, then no money flows to the U.S.; win or lose, according to the theory, bidding causes a direct effect. If a U.S. bidder is disqualified and does not bid at all, then no money flows to the U.S.-a direct effect. If a U.S. company is not invited to bid, then no money flows to the U.S.-another direct effect. A foreign country's failure even to conduct a bidding process would have a direct effect in the United States because no money would flow to a U.S. company that would presumably have won the bid and brought money back to the U.S. It is hard to imagine a circumstance under American Telecom's theory that would not cause a direct effect in the United States.

American Telecom complains that its payment of $30,000 to enter the bids caused a direct effect in the United States because this payment was made from an American bank. But even if this payment produced a direct effect, that effect was not *caused* by Lebanon. American Telecom was not required to submit payment from an American bank; it chose to do so, and to the extent that making that payment had a direct effect in the United States, the effect was the direct result of American Telecom's action, not Lebanon's. If American Telecom's payment to participate in a bid in Lebanon towards winning a contract to provide cellular phone

service in Lebanon constitutes a direct effect in the United States, then every payment to a foreign country would qualify and the "direct effect" requirement would cease to exist. Had Congress intended so broad a rule, it surely could have written one. It did not, and "the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States." *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160.

Therefore, we hold that the mere act of including an American company in or excluding an American company from the process of bidding on a contract, where both parties' performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and therefore, does not "cause a direct effect in the United States" for purposes of 28 U.S.C. § 1605(a)(2).

IV.

For the foregoing reasons, we **AFFIRM** the judgment of the district court dismissing this case for lack of subject matter jurisdiction.

APPENDIX B — OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1) OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED SEPTEMBER 9, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 04-72596

Honorable Nancy G. Edmunds

AMERICAN TELECOM CO., L.L.C., ET AL.,

Plaintiffs,

v.

THE REPUBLIC OF LEBANON,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)

This matter comes before the Court on Defendant's motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, arguing that Defendant Republic of Lebanon is entitled to

immunity from this lawsuit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. The issue presented in Defendant's motion is whether the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), applies here. Because Plaintiffs have not persuaded the Court that Defendant's allegedly improper conduct has a direct effect in the United States, Defendant's motion is GRANTED.

I. Facts

In July 2004, Plaintiffs filed a complaint alleging breach of contract, breach of an implied contract, promissory estoppel, fraudulent misrepresentation, and fraud in the inducement against Defendant Lebanon for its conduct in connection with Plaintiffs' bid proposals for two commercial contracts to manage cellular phone networks in Lebanon. The complaint alleges the following.

From 1994 through 2002, two companies held contracts with Lebanon to manage the two Global System for Mobile networks in Lebanon (the "GSM Networks") for a fee of $7,500,000 per month. (Compl. at ¶¶ 5-6.) In 2002, Lebanon terminated the contracts and announced that it would soon be holding an Auction-Tender for the management contracts of the GSM Networks. (*Id.* at ¶¶ 7-8.)

In January 2003, Plaintiffs paid $25,000 in exchange for a good faith and fair opportunity to participate in Auction-Tender. (*Id.* at ¶¶ 9-14.) Despite the fact that

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Plaintiffs had satisfied all pre-qualification requirements, they were disqualified without explanation. (*Id.* at ¶¶ 7-21.) The Auction-Tender was eventually cancelled due to questionable conduct by the Lebanese official running it, and Lebanon announced a new tender ("New Public Tender") to be run by a different department of the Lebanese Government, the Ministry of Telecommunications. (*Id.* at ¶¶ 22-24.)

Plaintiffs were concerned about submitting a proposal for the New Public Tender inasmuch as many less-qualified non-American companies had been pre-qualified in the Auction-Tender while Plaintiffs had been disqualified. (*Id.* at ¶ 25.) Plaintiffs opted to submit a proposal only after the Minister of Telecommunications and other Lebanese officials convinced Plaintiffs that Lebanon wanted American participation and that the New Tender would be handled in an appropriate manner, with all being treated in a fair manner and in good faith. (*Id.* at ¶¶ 25-30.) Accordingly, with these assurances from the Lebanese Government, Plaintiffs paid Lebanon a fee of $5,000 in exchange for a good faith and fair opportunity to participate in the New Public Tender. (*Id.*)

Unbeknownst to Plaintiffs, however, Lebanon only wanted an American company to participate in the New Public Tender in order to lend legitimacy to the process and to drive down the bids of the European and Arab companies. In fact, Lebanon had no intention of ever allowing an American company to be awarded a GSM Network management contract. (*Id.* at ¶ 29.)

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After months of preparation costing over $500,000, Plaintiffs submitted their bid for the four-year management contract of GSM Networks, following all the rules and requirements contained in the Tender Information and Procedures (the "TIP"). (Compl. at ¶¶ 31-34; Ex. Q, TIP.) These included a $2 million performance bond (the "Tender Bond"), guaranteeing the payment of $2 million to Lebanon if certain conditions occurred. Plaintiffs obtained the Tender Bond from an American Bank, First International Exchange Group, Inc. ("First International"), an affiliate of Atlantic Bank, located in Bingham Farms, Michigan. (Compl. at ¶ 31; Ex. Q, TIP at ix; Ex. U, Tender Bond.)

To participate in the New Public Tender, Plaintiffs were also required to obtain a Letter of Comfort from a qualified Lebanese bank assuring the issuance of both a $10 million bond (the "Management Performance Bond") and a bank guarantee in the amount of $20 million (the "Monthly Collection Guarantee"). (Compl. at ¶ 31.C.1.) Although Plaintiffs worked with a qualified Lebanese bank to secure the Tender Bond and the Letter of Comfort assuring the issuance of the Management Performance and Monthly Collection Bonds, difficulties arose. After numerous complaints, Lebanese Minister Qordahi altered the requirements for the Tender Bond and the Letter of Comfort, allowing the applicants to secure bank guarantees from an American financial institution but refused to extend the March 29, 2004 deadline for applications. (Compl. at ¶ 36.) Plaintiffs obtained all the required bonds from First International. (*Id.* at ¶ 37-39.) Because time was of the essence,

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Plaintiffs submitted emailed copies of several submission documents, including the Tender Bond, because the TIP did not bar such submission and a Lebanese Government employee had confirmed that emailed copies would be acceptable for submission. (*Id.* at ¶¶ 4-42; Ex. Q, TIP.)

Plaintiffs strategically made an initial bid of $6.16 million per month for the management of the GSM Networks, but were prepared to lower the bid to $3.99 million per month during the "open tender" portion of the bidding, which allowed those deemed admissible to participate an opportunity to adjust their bids after the initial bids were revealed. (Compl. at ¶ 43; Ex. Q, TIP.)

On March 29, 2004, the date of the New Public Tender, Lebanon informed Plaintiffs that they were disqualified from participating because the Tender Bond in Plaintiffs' submission was an email document instead of an original document. (Compl. at ¶ 44.) Lebanon then announced the pre-qualification of seven non-American companies. (*Id.* at ¶ 45.)

At the conclusion of the bidding, Detecon of Germany and Mobile Telecom Company of Kuwait were the low bidders and were awarded the management contracts for the GSM Networks. Detecon was awarded the four-year management contract for one network for $4.2 million per month ($201 million total). Mobile Telecom Company was awarded the other four-year management contract for $4.25 million per month ($204 million total). (Compl. at ¶ 46.)

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Defendant Lebanon presents the Court with documents that reveal additional facts relevant to this Court's inquiry.

In connection with the New Public Tender, Plaintiffs were required to initially submit two documents: an Expression of Interest ("EOI") and a Non-Disclosure Undertaking ("NDU"). These documents required Plaintiffs to acknowledge that their application to become a participant in the New Public Tender for the Network contracts did not in any way bind Lebanon to accept their proposal or to allow their participation. Specifically, in the EOI, Plaintiffs acknowledged their understanding that the document was "not legally binding and does not obligate the Ministry in any manner towards our consortium in connection with the Tender." (Def.'s Ex. B, EOI.) Moreover, the NDU, which Plaintiffs were required to and did execute, similarly provided that:

> Neither the Confidential Information nor anything else in this letter constitutes an offer by or on behalf of the Ministry and the Ministry will be under no obligation to accept any offer or proposal which may be made by the Applicant or on the Applicant's behalf. Neither the Confidential Information nor anything else in this letter will form the basis of any contract, which will constituted solely by an final agreement(s) to be negotiated and entered into between the Applicant and the Ministry.

(Def.'s Ex. B, 2/25/04 NDU at ¶ 2(f).) The NDU further provided that the Applicant was responsible "for any costs incurred by it or on its behalf in connection with the Tender" and that the NDU was to be "governed by and construed in accordance with Lebanese law and that the parties hereby submit to the non-exclusive jurisdiction of the Commercial Court of Beirut" for any lawsuits regarding the subject matter of the NDU. (*Id.* at ¶¶ 5, 10.)

The TIP established the guidelines for all bid applicants. That document, in its Preface, clearly expressed that "The Republic of Lebanon reserves the right to reject the offer to manage either of the Mobile Businesses through the Tender, and to discontinue the Tender at any time for any reason." (Def.'s Ex. C, TIP at ii.)

The successful bidders in the New Public Tender were awarded Management Agreements for the Lebanese wireless networks. The terms of that Agreement reveal the following obligations on the part of the successful bidder. It must form a "company" in Lebanon and that company must assume all existing and new employee contracts. (Def.'s Ex. D, Management Agreement at 5, ¶ 1.1, defining "company" as "a wholly owned subsidiary in Lebanon ... or a Lebanese joint stock company (S.A.L.) to be incorporated in Lebanon by the Selected Participant and that shall assume the contracts of the Existing Personnel and all other employees".) It was further required to hire all existing Lebanese employees who wished to remain "for a

minimum of four years on the same or better terms . . . , while preserving the Employees' vested rights and years of service." (*Id.* at 21-22, ¶ 12.1.) Moreover, all user service fees under the contract were to be paid in Lebanon and deposited into a Lebanese bank account. Then, all management fees would be withdrawn from that Lebanese bank account, with the remaining funds being transferred to the Lebanese Government. (*Id.* at 19, ¶ 8.2.) Disputes arising out of the Agreement must be settled through arbitration proceedings in Geneva, Switzerland. (*Id.* at 47, ¶ 40.2.)

This matter is presently before the Court on Defendant's motion to dismiss, arguing that this Court lacks subject matter jurisdiction of Plaintiffs' lawsuit because the FSIA affords Lebanon immunity from suit. Plaintiffs respond that Lebanon is not immune from suit because the FSIA's commercial activity exception applies.

II. Standard of Review-Rule 12(b)(1) Motions

Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks. *United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir. 1994). The parties do not dispute that Defendant's motion presents a factual attack; i.e., "not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *Id.* Accordingly, "no presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence

and satisfy itself as to the existence of its power to hear the case." *Id.* (Internal citation omitted.)

III. Analysis

The Court begins its analysis by examining the FSIA and its commercial activity exception. Lebanon argues that it is entitled to immunity from this lawsuit under § 1604 of the FSIA, which provides that: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Plaintiffs, on the other hand, argue that Lebanon does not have immunity because the commercial activity exception set forth in § 1605(a)(2) applies here. The FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), provides that a foreign state is not immune from the Court's jurisdiction "in any case" in which:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. § 1605(a)(2).

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The burden of proof on this issue is as follows:

> The party claiming FSIA immunity bears the initial burden of proof establishing a prima facie case that it satisfies the FSIA's definition of a foreign state; once this prima facie case is established, the burden of production shifts to the non-movant to show that an exception applies. [citation omitted] Nevertheless, the party claiming FSIA immunity retains the ultimate burden of persuasion throughout.

Keller v. Central Bank of Nigeria, 277 F.3d 811, 815 (6th Cir.2002). There is no dispute that Lebanon is a foreign state. Accordingly, it is Plaintiffs' burden to produce evidence showing that an exception applies.

Plaintiffs argue that the commercial activity exception applies because (1) Lebanon's actions are commercial in nature; i.e., it solicited bids for a commercial project just as any private commercial party would do, and (2) Lebanon's commercial activity had a direct effect in the United States; i.e., wrongfully depriving Plaintiffs of the lucrative contracts at issue here which would have been performed in part by employees in the United States. Lebanon does not contest the first element, but does dispute the second.

The first element is satisfied "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it. . . ." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct.

2160, 119 L.Ed.2d 394 (1992). Here, the contracts at issue were for cellular phone services; the type of commercial activity done by private parties.

The second element—"a direct effect in the United States"—has been described by the Supreme Court as follows: "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.' " *Republic of Argentina v. Weltover,* 504 U.S. 607, 618, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (citation omitted). The Sixth Circuit has declined to adopt the "legally significant acts test" applied by the Tenth Circuit in *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n,* 33 F.3d 1232, 1239 (10th Cir.1994). *Keller,* 277 F.3d at 817. Rather, the Sixth Circuit agreed with those appellate courts reasoning that when the Supreme Court rejected the suggestion that § 1605(a)(2) contains any unexpressed requirement of "substantiality" or "foreseeability," "this holding was an admonishment to the courts not to add any unexpressed requirements to the language of the statute." *Keller,* 277 F.3d at 818 (discussing *Republic of Argentina v. Weltover,* 504 U.S. 607, 618, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992)). In *Keller,* the Sixth Circuit found that the failure to transmit promised funds to a bank account in Cleveland "constituted a direct effect in the United States." *Keller,* 277 F.3d at 818.

Contrary to Lebanon's arguments here, the *Weltover* and *Keller* decisions do not limit application of the commercial activity exception to circumstances where there is a contract between the parties and an obligation to make payments in the United States. Rather, in

determining whether the commercial activity exception applies, the Sixth Circuit follows *Weltover* and determines whether the conduct complained about has a direct effect in the United States by examining whether the claimed effect in the United States "follows 'as an immediate consequence of the defendant's . . . activity.'" *Id.* at 817 (quoting *Weltover,* 504 U.S. at 618, 112 S.Ct. 2160). *See also Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445, 453 (6th Cir.1988) (observing, as to the plaintiff's lawsuit complaining that defendants had unlawfully obtained and used its trade secrets, that "[i]t is difficult to imagine conduct which will have a more direct effect upon plaintiff, which is located and operates in the United States.").

As Plaintiffs correctly observe, the guiding principle to be discerned from the *Weltover* and *Keller* decisions is that a contractual promise to pay funds in the United States is sufficient to show that FSIA's commercial activity exception applies. These decisions do not, however, hold that such conditions are necessary for application of that exception. To the extent *Dominican Energy Limited, Inc. v. Dominican Republic,* 903 F. Supp. 1507 (M.D.Fla.1995), holds otherwise, this Court declines to adopt the rationale of that non-binding precedent.

The Court now examines the conduct of the Lebanese Government that Plaintiffs complain about in this suit to determine what effects, if any, will follow in the United States as an immediate consequence of that challenged activity. The gist of Plaintiffs' complaint is

that Lebanon made fraudulent misrepresentations in connection with the application to bid process, fraudulently induced it to take part in the New Public Tender application process, and breached agreements to be fair and to consider, in good faith, Plaintiffs' applications to participate in the Auction-Tender and the New Public Tender bidding process. In their brief, Plaintiffs do not discuss the direct effects in the United States of Lebanon's alleged fraudulent misrepresentations or its fraudulent inducement.[1] Rather, Plaintiffs focus on their breach of contract claims.

Plaintiffs speculate that, if their applications had been considered fairly and in good faith, then they would have been chosen as a Selected Participant for one or both of the two contracts at issue and further speculate that they would have subsequently been chosen to enter into a Management Agreement with the Lebanese Government. This, in turn, would provide these American companies, as sole shareholders in the Lebanese subsidiary, with huge profits and the

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1. As discussed at the hearing on this matter, the immediate consequence of this activity would be Plaintiffs' payment of money to Lebanon; i.e., $25,000 to apply for the opportunity to take part in the Auction-Tender and $5,000 to apply for the opportunity to take part in the New Public Tender, as well as the expenditure of approximately $500,000 in connection with the application for the New Public Tender. Plaintiffs, however, failed to provide the Court with any authority supporting application of FSIA's commercial activity exception under these circumstances.

corresponding opportunity to hire American workers in addition to the retained Lebanese employees, to export American-made goods, and to pay taxes to the United States Government.

There are several problems with these arguments. First, the chain of events Plaintiffs describe are not the immediate consequence of Lebanon's challenged activity. The immediate consequence would be the denial of their application. Second, contrary to the documentation presented to the Court, Plaintiffs' argument implies terms of good faith and fair dealing that are not expressed in the application documents. In the EOI and NDU, Plaintiffs acknowledged their understanding that the Lebanese Ministry was not obligated to Plaintiffs in any manner and that the Ministry was under "no obligation to accept any offer or proposal . . . made by the Applicant or on the Applicant's behalf." (Def.'s Ex. B, NDU at 2, ¶ 2(f).) The Preface to the TIP further emphasized that "The Republic of Lebanon reserves the right to reject the offer to manage either of the Mobile Businesses . . . at any time for any reason." (Def.'s Ex. C, TIP at ii.)

Plaintiffs' final argument likewise fails. Plaintiffs speculate that, if they had been chosen as a Selected Participant in the New Public Tender bidding process and failed to perform as required in that bidding process, then the $2 million Tender Bond they obtained from an American bank would require payment from that American Bank to the Lebanese Government. The chain of events Plaintiffs describe in this scenario are not the

immediate consequence of any activity on the part of the Lebanese Government that Plaintiffs challenge in this suit. Rather, they speculate about a breach of the Tender Bond by Plaintiffs that would trigger action by Lebanon for payments obligated to be paid to Lebanon; actions that would have a direct effect in Lebanon, not the United States.

Because Plaintiffs have not shown that the FSIA's commercial activity applies here, Lebanon's motion to dismiss is GRANTED.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is GRANTED. Plaintiffs' complaint is dismissed.

s/ Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: September 9, 2005